IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY and THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioners,

vs.

E. B. SPILLER et al.,
Respondents.

No. 577.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF STATE OF MISSOURI, AMICUS CURIAE.

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MOTION OF STATE OF MISSOURI FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes the State of Missouri and respectfully presents to the Court that, in its corporate capacity, it was one of the shippers and passengers from whom excessive freight and passenger charges were exacted by the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railroad Company (since reorganized into the Missouri Pacific Railroad Company) pending the Rate Contesting Cases instituted in the Circuit

Court of the Western District of Missouri to contest the validity of the Maximum Freight Rate Laws of 1905 and the Maximum Passenger and Freight Laws of 1907 of the State of Missouri.

That the claim of the State of Missouri to recover back excess charges in violation of said freight statute are now pending by way of intervention in the Missouri Pacific and Iron Mountain receiverships in the United States District Court of the Eastern Division of the Eastern District of Missouri.

That said claims amount to many thousands of dollars and that for these reasons the State of Missouri is interested in the decision of the instant case.

II.

That said state is further interested to know whether or not there is a public duty on the part of railways incorporated under the laws of the State of Missouri, and which derive their existence from said state, to pay back to the shippers and passengers of said state overcharges on freight and passenger traffic exacted in violation of a valid statute of the state, while the hands of the shippers and passengers were tied by an erroneous and wrongful injunction issued from a Federal Court.

III.

That this Honorable Court has heretofore granted the privilege to the Missouri Pacific Railroad Company (the

reorganized Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railroad Company) to file a brief as amicus curiae herein.

IV.

That respondents herein have consented to the State of Missouri filing a brief as amicus curiae, but that petitioner has declined to consent to same.

Wherefore, the State of Missouri asks that an order be entered permitting it to file the brief hereto attached as amicus curiae.

NORTH T. GENTRY,
Attorney General,

LEE B. EWING,
Special Counsel,
For State of Missouri.

NOTICE OF MOTION.

The petitioner and respondent in this case are notified that the State of Missouri will, on the 11th day of April, 1927, on the convening of the Supreme Court of the United States on that date, or as soon thereafter as hearing may be had, submit the foregoing motion for the consideration of the Court.

North T. Gentry,
Attorney General,

Lee B. Ewing,
Special Counsel,
For State of Missouri.

Service of the foregoing notice, motion and brief is hereby acknowledged, and respondent consents that the brief may be filed.

....

Attorneys for Respondent.

....

Attorneys for Petitioner.

SUBJECT INDEX.

Cases Cited.

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STATEMENT.

The instant case is a suit for recovery of unjust and unreasonable interstate rates by respondents from petitioners, on account of shipments of live stock.

In 1903 the petitioner published the rates complained of. In 1905 the rates were attacked before the Interstate Commerce Commission and by it held to be unjust and

unreasonable and petitioner was ordered to cease and desist from charging such unjust and unreasonable rates. After the enactment of the Hepburn Act in 1906 the Interstate Commerce Commission was given power to prescribe rates. In 1906, and after the enactment of the Hepburn law, the Commission again had the rates in question under consideration, and held same to be unjust and unreasonable, and made an order prescribing rates for the future to take effect November 17, 1908. The question of reparation from August 29, 1906, was reserved by the Commission to be subsequently decided. The overcharges here were exacted between August 29, 1906, and November 17, 1908. Subsequently respondent presented its claim to the Interstate Commerce Commission and an award of reparation was obtained. Upon this award a judgment was obtained against petitioner, St. Louis & San Francisco Railroad Company, and suit was brought upon said judgment against the receivers of the St. Louis & San Francisco Railroad Company and the reorganized company, the St. Louis-San Francisco Railway Company. The Circuit Court of Appeals of the Eighth Circuit entered a decree in favor of respondents, and held that respondents were entitled to a preferential payment of their claims.

The State of Missouri is interested in this question for the reason that in 1905 and 1907 it enacted what was known as the "Maximum Freight Rate and Maximum

Freight Rate and Passenger Statute," applicable to intrastate commerce in said state. These statutes were attacked by the various railroads in the state, and among others the Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railroad Company and the Missouri, Kansas & Texas Railway Company. Claims for overcharges against said railroads by the state, in its corporate capacity, amounting to many thousands of dollars are now pending against the railroads just mentioned, and in each of these cases, the state contends that the overcharges were exacted in violation of a valid statute, without the consent of the shipper and under practical duress, and that neither the railway companies, nor the receivers, nor the reorganized companies obtained any title to said overcharges, and that same constitute a trust fund in the hands of said railroad, receivers and reorganized company.

The state further contends that there is a public duty resting on these carriers, who were created by the state, to restore to the shippers and passengers of the state the said overcharges exacted in violation of law, and against the will of the shippers and that this is a duty that the courts should be careful to enforce.

The claims of the state and the shippers and passengers of Missouri against these railroads are entitled to a preferential payment, because the overcharges illegally ex-

acted, as above set forth, went into the treasury of the old railroad companies and into the hands of the receivers, and were commingled with other funds and passed to the hands of the reorganized companies, and that out of such funds the railway companies, and the receivers, paid current taxes, paid for improvements and betterments to roadbed and for additional equipment, paid interest on bonded indebtedness and for supplies and operating expenses.

BRIEF AND ARGUMENT.

A.

Overcharges in question were unlawfully collected.

In the instant case, the action of the Interstate Commerce Commission in 1905 and again in 1908, holding the rates charged respondents **to be unjust and unreasonable,** were final; and conclusively branded said rates as **unlawful.** The decision in 1905 was rendered before the overcharges were exacted of respondent. Section 1 of the Interstate Commerce Act provides as follows:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering and handling of such property shall be reasonable and just, and every **unjust and unreasonable** charge for such service is **prohibited and declared to be unlawful.**"

The Interstate Commerce Act clearly and **specifically brands all unreasonable and unjust rates as unlawful;** therefore the exaction of the rates in question from respondent was an unlawful exaction and in violation of the express letter of the statute. The unlawful character of these rates had been conclusively determined before same were exacted. Said overcharges having been exacted in violation of an express statute, and against the will of

the shipper, and under practical duress, became a trust fund under a resulting trust, in the hands of the railroad company and the receiver.

B.

1.

Courts may hold a legislative act unconstitutional, but it is beyond the power of any court to suspend or amend a valid law, or change the effect thereof.

The foregoing proposition is so well embedded in our law that it seems a waste of time to call attention to it. However it seems to us that the recognition of this principle lies at the very bottom of the question now before this Court.

In the case of **White v. Delano**, 270 Mo., l. c. 34, **Woodson,** J., speaking for the Court, said:

> "I know of but two ways to suspend or repeal a statute duly enacted, and the first is by an act of the Legislature expressed or implied in the same or in a subsequently enacted statute, and second, by the courts of the state, in declaring a statute invalid in the exercise of their judicial authority. * * * We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned."

To hold that a valid statute is suspended and made inoperative by an erroneous decree of a court afterwards

reversed, is to hold that courts have legislative powers. Jus dare belongs to the legislature; jus dicere to the courts. If a statute is valid, then it is beyond the power of a court to suspend same.

In **Ogden v. Blackledge,** 2 Cranch 272, the United States Supreme Court said that courts may declare what the law is, but legislatures have the right to make laws and declare what they shall be. To hold that the injunction erroneously granted by Judge McPherson suspended a valid statute, would be to overturn the principles that lie at the very base of our system of government. To so hold would be to say that an erroneous injunction changed the Maximum Rate statutes of Missouri during the years from 1905 to 1914.

In the case of **Moor v. Damon,** 4 Mo. App., l. c. 115, Judge Hayden, speaking for a unanimous court, said:

> "The judgment when reversed and the law declared, that law is to be considered as having existed from the first. To hold the contrary would be directly at war with the theory on which our system of law is based, and would be to declare that it is a province of the courts jus dare non jus dicere."

In the case of **Pierce v. Pierce,** 46 Ind. 95, the Supreme Court of Indiana said:

> "This court has no power to repeal or abolish a statute."

Under our system, government is divided into three distinct branches—the legislative, the executive and the judicial. It is the sole province of the legislative branch to make the law. When that branch declares the law, there is no power resting in either one of the other branches to overturn, change or suspend that law, so long as the enactment conforms to the Constitution. The court may determine whether or not a given statute is within the powers limited to the legislature by the Constitution. And of necessity that question rests always for final determination in the courts of last resort. Whoever assails the constitutionality of a statute must know this fact. The enactment of constitutional statutes stands always the same. An erroneous and wrongful decision of the lower court cannot change the effect of a valid statute.

We plant this case squarely on the foundation that the Missouri Rate Statutes were valid and effective at all times, and that the erroneous injunctive decree, which was issued by Judge McPherson, in no way made lawful what the statute had declared unlawful. On this foundation we confidently stand in this court.

2.

A judgment reversed is as though it had never been.

The principle is firmly established in the courts of this country that, as between the parties, a judgment reversed

leaves the parties in the same position as though the judgment had never been rendered.

In the case of **Crispen v. Hannovan**, 86 Mo., l. c. 167-168, in speaking of the effect of a reversed judgment, the Missouri Supreme Court said:

> "The judgment, which was reversed on defendants' appeal, was an entirety, and the only effect on such reversal was to 'restore the parties to the same condition in which they were prior to the rendition of the judgment. The judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been heard of or decided by any court. Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication' (Freeman on Judgments, sec. 48)."

In the case of **Campbell v. Cauffman**, 127 Mo. App., l. c. 292, the Court said:

> "The flat, unqualified reversal by the Supreme Court of Florida, of the judgment of the Chancery Court of Duval County, requiring Campbell, as assignee to pay the $1,451.74 to respondent (herein) completely nullified the judgment and order, and its effect was to leave the case as though no judgment had ever been rendered or order made" (Moore v. Damon, 4 Mo. App. 111; 3 Cyc. 460).

In 3 Cyc. 460 it is said:

> "The effect of a general and unqualified setting aside of a judgment, order, or decree is to annul it completely, and to leave the case standing as if such judgment, order or decree had never been rendered; and the judgment debtor is entitled to be restored to the property or rights that he has lost by reason thereof."

4 C. J. 1204 lays down the rule as follows:

> "The effect of a general and unqualified reversal of a judgment, order or decree is to annul it completely, and leave the case standing as if such judgment, order or decree had never been rendered."

In the case of **Ure v. Ure**, 223 Ill. 454, 114 Am. St. R., l. c. 342, the Court said:

> "The effect of reversing the decree of January 4, 1892, was to abrogate it, and the cause stood in the Circuit Court precisely as it did before the entry of the decree. The decree was, in effect, expunged from the record and the parties to the litigation were restored to their original rights (McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Chickering v. Failes, 29 Ill. 294; Cable v. Ellis, 120 Ill. 136, 11 N. E. 188; Aurora etc. Ry. Co. v. Harvey, 178 Ill 477, 53 N. E. 331; Freeman on Judgments, sec. 481). **A party to a suit is presumed to know of all the errors in the record, and such party cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof.**"

In the case of **Bellamy v. Ry.**, 227 Fed. 878, the Court said:

"Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way the right and remedy for its enforcement stood the same as if the injunction had never been issued."

In the case of **White v. Delano**, 270 Mo., l. c. 34, the Court, in considering the very injunction involved here, said:

"But that ruling was overruled by the Supreme Court of the United States when the case reached there on a writ of error, **thereby abrogating the judgment** of the lower court ab initio."

In the case of **Haebler v. Myers**, 132 N. Y. 363, the Court said:

"While the erroneous order was a protection to the Sheriff who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal and became, as to them, the same as if it had never been made."

In the case of **Railroad v. McKnight**, 244 U. S. 368, in speaking of the effect of such reversed injunctive decree,

and the rights of Gallop, who had been restrained by the decree, the United States Supreme Court said:

> "He sues on causes of action to recover overcharges arising under the Arkansas statutes. **His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill.**"

3.

When a decision, holding a statute unconstitutional is reversed or overruled, the statute will be treated as valid from the beginning.

That a valid statute is never affected by an erroneous decision, holding it unconstitutional, seems a self-evident truth. How can a valid law be invalid at any time? In the case of **White v. Delano,** 270 Mo., l. c. 34, the Supreme Court of Missouri, in speaking of the effect of the injunction involved, said:

> "But that ruling was overruled by the Supreme Court of the United States when the case reached there on a writ of error, thereby abrogating the judgment of the lower court ab initio. We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned."

In the case of **Solum v. R. R. Company,** 133 Minn. 93, 157 N. W. 996, the Supreme Court of Minnesota, in pass-

ing on the effect of an erroneous injunction restraining the enforcement of a statute fixing railroad rates, said:

> "As the state statute was a valid exercise of the legislative power, it necessarily follows that the rates prescribed therein have been the lawful rates from the time that the statute declared they should go into effect. The fact that defendant was legally, but erroneously, restrained, for a time, from putting such rate into effect, did not operate to make the rate unlawful or invalid during such period nor entitle the defendant to retain the excess above the lawful rate which it had collected by virtue of the erroneous injunction."

In the case of **Bellamy v. R. R.**, 220 Fed. 878, the Circuit Court of Appeals of the Eighth Circuit, in discussing the effect of an injunction restraining the enforcement of statutes fixing railway rates, and the rights of the shippers from whom overcharges were exacted, said:

> "They also had the right given them by law to recover the overcharges. **That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way the right and remedy for its enforcement stood the same as if the injunction had never been issued.**"

In the case of **McKnight v. R. R.**, 244 U. S., l. c. 374, in discussing the effect of the dissolution of an injunction restraining state officers from enforcing a statutory rate,

and the right of a shipper from whom overcharges had been exacted, the Court said:

> "His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill."

Corpus Juris, Vol. 12, p. 801, lays down the rule as follows:

> "If the decision that statute is unconstitutional is subsequently reversed or overruled, the statute will be treated as valid and effective from the date of its enactment."

In the case of **Moore v. Damon**, 4 Mo. App., l. c. 115, the Court, in speaking of the effect of a reversal of a judgment, said:

> "The judgment when reversed and the law declared, that law is to be considered as having existed from the first. **To hold the contrary would be directly at war with the theory on which our system of law is based,** and would be to declare that it is the province of the courts jus dare non jus dicere."

In the case of **Pierce v. Pierce,** 46 Ind. 95, the court had under consideration a state of facts, where a statute of that state had been held unconstitutional by the Supreme Court of Indiana. Subsequently the decision was overruled in a different case. In passing on the ques-

tion of the effect of overruling its former decision, the Indiana Supreme Court said:

> "The point made by counsel is 'that when the decision in the case of Langdon v. Applegate, 5 Ind. 327, declared the unconstitutionality of the act of 1853, and acts of like form, the same stood abolished, and private rights obtained their status, and became vested as if such unconstitutional and void acts had never been passed'
>
> "The consequence of overruling those cases was, that the statutes which, according to the rulings therein, would have been unconstitutional, were valid from the time of their enactment until they were repealed. It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the state. **This Court has no power to repeal or abolish statutes.** If it shall hold an act unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, **the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of persons must be determined accordingly.**"

McCullum v. McConaughy, 141 Ia. 172, the court had under consideration a state of facts where a statute of Iowa had been held unconstitutional by the Supreme Court of that state, because in violation of the interstate commerce clause of the United States Constitution. Sub-

sequently, in a different case involving the same statute, the United States Supreme Court held the statute constitutional. The McCullum case followed the United States Supreme court, and overruled the previous decision of the Supreme Court of Iowa. In passing on the effect of overruling its own previous holdings, the Supreme Court of Iowa said:

> "The argument that our statutes become invalid by reason of our prior decision, and cannot now be enforced without re-enactment is entirely without weight. It is true that an unconstitutional statute, in so far as it is unconstitutional, is without force from the time of its enactment, but the decisions of the Court holding it to be unconstitutional may be overruled, and the supposed unconstitutionality may thus be found not to exist. * * * That a statute which has been held unconstitutional, either in in toto or as applied to a particular class of cases, is valid and enforceable after the supposed constitutional objection has been removed, or in cases on which the objection is not applicable is well settled."

The authorities quoted conclusively show that when a judgment holding a statute unconstitutional is reversed, the erroneous and reversed judgment is treated as though it never had existed. The statute having been passed by legislative authority, and being within the Constitution and a valid exercise of legislative power, is held to be effective from the date of its enactment, or the time provided in the State Constitution for its taking effect. It

is in nowise suspended, amended or affected by reason of the erroneous judgment holding it unconstitutional. It must follow that when the erroneous judgment of Judge McPherson was overturned by the Supreme Court of the United States (Knot et al. v. M. K. & T. Ry., 230 U. S. 474, and 230 U. S. 352) it left the Missouri Maximum Rate Statutes valid and binding during all the period from 1905 to 1914, and until the same were amended by legislative authority. In the language of Justice Hayden, in the case of **Moore v. Damon**, supra, "To hold the contrary would be directly at war with the theory on which our system of law is based." The courts may interpret statutes, but they have no power to suspend them. In the language of Judge Woodson in the case of **White v. Delano**, "I know of but two ways to suspend or repeal a statute duly enacted. * * * The first is by an act of the Legislature expressed or implied in the same or a subsequently enacted statute, and the second by courts * * * in declaring a statute invalid in exercise of their judicial authority."

The holding, therefore, that the overcharges were "lawfully collected and the legal and equitable title thereto was at all times in the railway company" cannot be reconciled with the authorities quoted above. This conclusion is absolutely at war "with the theory on which our system of law is based." A valid statute is always valid. No judgment of a court can affect the operation of a valid statute. A different conclusion is tantamount

to a finding that an erroneous and wrongful injunction against a valid statute makes the statute invalid; that the wrongful injunction makes right what was wrong, and wrong what was theretofore right. This conclusion enables the defendant railway company, at whose instance the erroneous and wrongful decree was rendered, to obtain an advantage and title to property by doing the thing that a lawful statute denominates as unlawful and wrongful.

But for the wrongful injunction issued by Judge McPherson, the money of intervener (State of Missouri) would not now be in the hands of the defendant railway company. But for that injunction, the money which the state seeks to regain herein would be in its own hands. But for that injunction, the state would never have been deprived of its property; but for that injunction the money would not have been obtained from them and they would not now be here seeking redress.

Having failed in the suit to strike down the Rate Statutes, and having obtained the money of interveners by virtue of their own voluntary wrong by exacting charges in excess of statutory rates, that stand valid to this day, will a court of equity permit defendant railway company and its receiver to retain fruits of their own wrong? Will a court of equity permit them to assert that a **wrongful injunction** made right what was theretofore wrong? What could be more unconscionable? It was an act of a court of equity, in tying the hands of the state

officers and closing the doors of the state courts by its wrongful order that enabled defendants to unlawfully exact the overcharges in question. We can conceive of no higher duty resting on that same equity court than to undo its own wrong and restore to the interveners that which is their own. The same equity court should seek for the speediest and most simple way to bring about the righting of its own wrong. To paraphrase the language of the Court of Appeals in this Circuit, in the case of **Love v. North American Company,** "This **is** a duty not only to the shippers. It **is** a public duty owing to the state whose orders has been superseded. It is a duty which this Court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

C.

1.

The collection of the overcharges in question was wrongful, in violation of a valid statute, against the will of the interveners, and under practical duress. It has been repeatedly adjudicated that the collection of the overcharges in question was wrongful and in violation of the law, and under practical duress.

In the case of the **Arkadelphia Milling Co. v. Railroad,**

249 U. S. 134, l. c. 147, in speaking on this question, the Court answering a contention of the railroad said:

> "The contention that there was error in allowing interest on the amount of the overcharges is unsubstantial. The damage was complete when the overcharges were made, **and as they were wrongfully made and without consent of the shippers,** interest ran from that date on general principles."

In the case of **Railroad v. Lockwood,** 17 Wall. 379, the United States Supreme Court said:

> "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to accept any bill of lading. * * * In most cases he has no alternative but to do this or abandon his business."

In the case of **State ex rel. Barker v. Railroad,** 216 Fed. 564, in discussing the identical rate statutes here involved, **Judge Van Valkenburgh** said:

> "The suits are not on the bond, nor from any damages accruing from the injunction as such. They seek merely to recover alleged overpayments of rates and charges made under practical duress, and in violation of the terms of what has now been adjudicated a valid statute regulation."

In the case of **Southern Pacific Co. v. Adjustment Co.**, 237 Fed., l. c. 962, in discussing the question of payment of rates to a railroad company, the Court said:

> "It is well settled that money paid under compulsion may be recovered, even in the absence of protest at the time of payment. * * * Payments made to a railroad company for freight charges, as these payments were made, are clearly payments under compulsion."

2.

Defendant railroad company and its receiver acquired no title to the overcharge exacted, and the same constituted a trust fund in their hands.

Special Master Seddon in his report in M. K. & T. overcharge cases, quoted from his own opinion on the motion of the State of Missouri to strike out parts of defendant's answer to its intervening petition. In his opinion on that motion, the Master said:

> **"The tying of the hands of the interveners by the injunction proceedings, so that it could make no effective resistance to the exaction of these excessive charges, did not directly and proximately cause the damage or loss to it** (intervener). **What did cause the damage was the voluntary act of the defendant in collecting the illegal charges under practical duress, and under cover of the protection of the injunction."**

In the Master's opinion on said motion, he further said:

> "**The intervener is not a mere general creditor** with the action for money had and received, **but is the beneficiary under a constructive trust.**"

It is thus seen that the Special Master Seddon has heretofore held that the identical overcharges herein sued for, constituted a trust fund in the hands of defendants. In so holding, the Master followed the most eminent authorities, both text writers and courts, upon the question.

In **Story's Equity Juris** (13 Ed.) p. 604, Section 1255, the rule is thus laid down:

> "One of the common cases in which a court of equity acts upon the ground of implied trusts in invitum is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked that the receipt of money which consistently with conscience cannot be retained is in equity sufficient to raise a trust in favor of the party for whom or on whose account it was received. And therefore whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now with a safe conscience, ex aequo et bono, retain it."

The Court of Appeals for this circuit in the case of **Love v. North Amrican Company,** 229 Fed., l. c. 106, in dealing

with the question of overcharges exacted when the state officers and shippers were restrained by injunction from enforcing statutory rates, said:

> "The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor to the Frisco Company itself. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers like the receivers, the moneys belonged to the shippers, after the payment the same as before.
>
> * * * * * * *
>
> "There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this Court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

In the case of **White v. Delano**, 270 Mo., l. c. 38, the Supreme Court of Missouri, in passing on overcharges exacted under the very statutes, and under the very same conditions as in the instant cases, quoted and approved the language of the Love case. The Court then said:

> "The rate statutes here under consideration are valid, as held by the Supreme Court of the United States, and therefore, the excessive charges collected from plaintiff were unlawfully collected. So the question naturally arises, as asked by said Circuit Court of Appeals, to whom do the excessive charges collected by the Wabash Company from the plaintiff for the transportation of his freight belong? They do not belong to the general creditors of the Wabash Company, nor to the bondholders, nor to the Wabash Company itself. Unquestionably they belong to the plaintiff in this case."

In the case of **Angle v. Chicago, St. P. & O. Ry. Company,** 151 U. S., l. c. 25, in discussing the rules in relation to constructive or resulting trust, Justice Brewer, in speaking for the Court, said:

> * * * "While no expressed trust is affirmed as to the lands, it is familiar doctrine that a party who acquired title to property wrongfully may be adjudged a trustee ex male ficio in regard to that property."

Judge Brewer then quotes from Pomeroy Eq. Jur., as follows:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, **duress, taking advantage of one's weakness or necessities** or through any other similar means which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. * * * The forms and varieties of these trusts, which are termed ex male ficio or ex delicto, are practically without limit. The **principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.**"

In the **Arkadelphia** case, 249 U. S. 134, the Court said:

"The contention that there was error in allowing interest upon the amount of the overcharges is unsubstantial. **The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers,** interest ran from that date on general principles."

D.

Judge Sanborn's decision quoted by Missouri Pacific Railroad is in direct conflict with controlling decisions of this Court.

The opinion of Judge Sanborn cited by the Missouri Pacific Railway Company in its brief, as amicus curiae, p. 11, is contrary to all the authorities hereinbefore cited and reviewed. As heretofore pointed out, the valid and constitutional statute is not affected in anywise by an erroneous decree holding it unconstitutional. We apprehend that no authority can be found sustaining Judge Sanborn's opinion in this particular. To give to the erroneous injunction in the Missouri Rate cases the construction which Judge Sanborn gave it, is to violate the very basic principles of our Government. The Legislature had enacted a valid statute fixing intrastate freight and passenger rates for the State of Missouri, 230 U. S. 474; 230 U. S. 352. The Legislature having acted within its sovereign power under the Constitution, upon this question, and enacted a valid law, the effect of that law was not in anywise abrogated or changed by the erroneous judgment holding the law unconstitutional.

E.

Cases cited by petitioner distinguished.

The cases cited by petitioner in its brief (pp. 23-26), do not sustain its contention. The case of the Texas Pacific

Ry. Co. v. Abilene Cotton Oil Company, 204 U. S. 426, the case of Pennsylvania Ry. Co. v. International Coal Mining Co., 230 U. S. 184, and the case of Robinson v. Baltimore & Ohio Railroad Co., 222 U. S. 506, were cases involving discrimination under the sixth section of the Interstate Commerce Act. These cases in nowise decide that an **unjust and unreasonable** rate is a lawful rate, merely because it is published by the carrier. They do decide that when the carrier has published a rate he may not depart from it in favor of one shipper, as against another. These cases apply solely to the question of uniformity of rates. The question as to whether or not a carrier who exacts **unjust and unreasonable rates,** in violation of Section 1 of the Interstate Commerce Act, obtains legal title to said overcharges, was not before the court in any of these cases, and was not in anywise held in judgment or passed upon therein. On the contrary, in the Abilene Cotton Oil case, 204 U. S. 426, the Court expressly says that the act made it the duty of carriers, subject to its provisions, **to charge only just and reasonable rates.**

When a carrier publishes a rate which is unjust and unreasonable, it has the power to immediately change said rate, whenever it sees fit, by publishing a rate that is just and reasonable. The sixth section of the Interstate Commerce Act cannot be construed so as to make lawful what the first section of the act expressly declares to be unlawful. The sixth section is aimed at the question of uni-

formity and is intended to prevent discrimination and favoritism on the part of the carrier; and when so construed, it is in absolute harmony with the first section of the act and does not in anywise conflict therewith. The opinion of Judge Sanborn construing the Interstate Commerce Act, quoted on page 25 of petitioner's brief, is absolutely out of harmony with the purpose of the act and creates a conflict between sections one and six, which does not exist. Judge Sanborn entirely overlooks the fact that section 6 was intended wholly and solely to guard against discrimination and to provide uniformity in the rates charged by the carrier.

The fact that the carrier cannot depart from the rate that it has published, so long as it retains it as its published rate, cannot, by any fair construction of the act, be deemed to make lawful that which the first section of the act says shall be unlawful. If a rate is unjust and unreasonable, it is not lawful, notwithstanding that the railway company must make a uniform charge of the published rate until it changes same. The Abilene case clearly sustains this view of the act.

The opinion of Judge Sanborn, if carried to its logical conclusion, would result in the very discrimination which the Interstate Commerce Act by section 6 prohibits; for the reason that a solvent railroad would be compelled to pay back the excess over a just and reasonable rate, while a railroad that becomes insolvent and goes into

the hands of a receiver would be permitted to retain the overcharges.

F.

Where a railroad company gets money into its treasury in violation of valid laws fixed by the state which created it, there is a public duty owing to the state, to restore the unlawful exactions.

The **Court of Appeals** for the **Eighth Circuit** in the case of **Love v. North American Company,** 229 Fed., l. c. 106, in dealing with the question of overcharges exacted when the state officers and shippers were restrained from enforcing statutory rates, said:

> "The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor to the Frisco Company itself. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers like the receivers, the money belonged to the shippers, after the payment the same as before.
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> "There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When

> those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

The foregoing opinion was quoted, with approval, and followed and applied by **Judge Pollock** in the case of **United States & Mexican Trust Co. v. Kansas City M. & O. Ry. Co.** et al., 240 Fed. 505. Likewise, the **Love** case was quoted with approval and followed in the case of **White v. Delano,** 270 Mo., l. c. 38.

There is no distinction between the Love case and the Missouri Overcharge cases. In the Love case, the Railroad and Warehouse Commission of Oklahoma fixed a certain rate under the Oklahoma law. The railroad had the right to appeal to the Supreme Court of Oklahoma from the decision of the Commission, by giving a supersedeas bond. This it did, and charged rates during the pendency of the appeal in excess of the Commission-made rate. The Love case held that the railroad obtained no title to this excess, as it was exacted in violation of a valid rate fixed by the Commission.

In the Missouri rate cases, the railroads obtained an injunction restraining the courts and officers of the State of Missouri from enforcing the statutory rates of that state, and during the pendency of the appeal taken by the state from the decision of the Circuit Judge, holding the application of the rates unconstitutional, the railroads collected rates in excess of the statutory rates, which statutory rates were held to be valid and binding by the United States Supreme Court (Knot v. M. K. & T. R. R., 230 U. S. 474; Simpson v. Sheppard, 230 U. S. 352).

There is, and can be, no distinction in principle between the two cases. The exactions in each case were made in violation of a valid law, while the validity of the law was being contested. In each case the legislative or commission-made rate was sustained.

In the case of **Mercantile Trust Co. v. St. Louis-San Francisco Ry. Co.**, 69 Fed. 193, the Court said:

> "A court of equity views with extreme disfavor the action of a railroad company which exacts exorbitant and illegal fares from the traveling public in violation of the laws of the state from which the company derives its right to operate its road, if not its existence. There would be small safety for the state or its citizens if these artificial creations could, with impunity, disregard the reasonable and just limitations placed upon their powers by their creator. A court of equity will not, under any circumstances, set the seal of its approval upon such violations of the public rights, but will exercise all its powers and its widest discretion, when the opportunity is afforded

it, to encourage every effort of the state or its citizens to put an end to such practices."

We believe that instead of lending aid to defeat the intervenors in their efforts to recover that money, this Court will be governed by the principle laid down in the case of Commonwealth ex rel. v. Scott, 112 Ky. 252. That is: "How to quickly, justly, inexpensively, restore to the citizen his own; * * * and if either form or substance must be sacrificed, as justice is the end, and the procedure the means, the Court will regulate the latter to attain the former."

CONCLUSION.

We submit that the opinion of the Court of Appeals of the Eighth Circuit in the instant case is in accord with the great weight of authority in this country, and that, so far as our search goes, the only opinions to the contrary are those written by Judge Sanborn. It has been held from the earliest times of common carriers that the collection of an unlawful rate was an illegal exaction, because of the dominating position of the carrier over the shipper, and the carrier did not become possessed of the equitable title to such money.

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